

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.498 OF 2016

Savitri Periyaswami Devendra, Age 52 years, R/o.Room No.46, Salamti Hills, Rawali Camp, M.A.Road, Sion-Koliwada, Mumbai-400 022	Applicant
versus	
The State of Maharashtra (Antop Hill Police Station CR No.02/2015)	Respondent

Mr.Ayaz Khan for applicant.
Ms.R.M.Gadhvi, APP, for Respondent-State.

CORAM : PRAKASH D. NAIK, J.
DATE : 21st February 2018

PC :

1. The applicant is aggrieved by order dated 16th July 2016 passed by NDPS Special Judge, Sessions Court, Greater Bombay below Exhibit-4 in NDPS Special Case No.170 of 2015 rejecting the application for discharge preferred by the applicant.
2. The applicant is arraigned as an accused in CR No.2 of 2015 registered with Antop Hill Police Station for offence u/s 8(C) r/w Sections 21 and 29 of Narcotic Drugs and Psychotropic Substances Act ('NDPS Act'). The first information report was registered on 4th January 2015.
3. Brief facts of the prosecution case are as follows :

(a) Information was received by Police Sub Inspector Gaokar attached to Antop Hill Police Station that persons namely Ganesh Devendra @ Anna and Sushila Devendra would come to Meccawadi junction area for selling narcotic drug;

(b) It was further revealed that both the persons are coming to the said place to sell heroin to their customers on 4th January 2015 between 1400 to 1430 hours at the aforesaid place. The description of both persons was also stated in the information;

(c) The information was provided to Police Inspector Bhillare, who thereafter passed on the same to Senior Police Inspector Surve attached to Antop Hill Police Station. The information was also provided to Assistant Police Commissioner of Sion Division, who directed the police to conduct a raid under the supervision of Police Inspector Bhillare. Copy of the information was forwarded to Senior Police Inspector and Assistant Commissioner of Police;

(d) The panchas were called in the office and raiding material was obtained for conducting the raid. The raid was organized under the supervision of Police Inspector Bhillare. Accused nos.1 and 2 were apprehended at the alleged spot. The search of accused no.1 resulted in recovery of 15 grams of heroin and that of accused no.2 resulted in recovery of 10 grams of heroin. The panchanama of all these events was recorded and accused nos.1 and 2 were taken into custody. The FIR was lodged for the aforesaid offences against accused nos.1 and 2;

(e) During the course of investigation the accused nos.1 and 2 stated before police that they have obtained the alleged contraband from lady by name Savitri Devendra r/o Sion-Koliwada and on her instructions they have come to sell the same at the alleged spot;

(f) Since name of the applicant was revealed during investigation and in accordance with panchanama, the applicant was shown as wanted accused in the said case. The applicant was thereafter arrested in this crime on 27th July 2015. On completing the investigation charge sheet was filed before the NDPS Special Court, at Mumbai.

4. The applicant preferred an application for discharge before the Special Court. The said application was rejected on 16th July 2016. Being aggrieved by the said order, the applicant has invoked the revisional jurisdiction of this Court challenging the impugned order.

5. Mr.Ayaz Khan, learned counsel for applicant in support of the application made following submissions in support of his application :

(a) The applicant was arrested on 27th July 2015 i.e. after a period of six months after the alleged seizure;

(b) There is no recovery of any contraband from or at the instance of applicant;

(c) The charge sheet does not contain any legally admissible evidence to prosecute the applicant;

(d) The name of applicant is not reflected in the information and she has been arrested only on the basis of statement of the co-accused;

(e) Except disclosure of the name of the applicant in the panchanama, there is no evidence against the applicant;

(f) The statement of the co-accused cannot be used as an evidence against the applicant. The Special Court has committed an error while rejecting the application for discharge preferred by the applicant;

(g) The reasons assigned by the Trial Court while rejecting the application for discharge are contrary to law;

(h) To frame charge, prima facie case has to be made out by the prosecution on the basis of legally admissible evidence, which is completely lacking in the present case.

6. Learned counsel placed reliance on following decisions :

- (i) Guljar Alibhai Shaikh Vs. State of Maharashtra and another - (Criminal Application No.5975/2017 decided on 21-12-2017 by Aurangabad Bench);
- (ii) Salim Babu Shaikh @ Aitun Vs. State of Maharashtra (Criminal Appln.No.1338 of 2012, dtd.21.1.2013);
- (iii) Shaikh Mohd. Hussain Usman Gani Vs. State of Maha. (Revision Appln.No.541/2015, dtd.23-11-2015);
- (iv) Laxmi Koli Babita Vs. State of Maharashtra 2005(1)-Bom.C.R. (Cri.)-403;

- (v) Order in Criminal Application No.497 of 2015, dated 26th April 2016 (Bombay Bench);
- (vi) Iran Khan s/o Kasam Khan Pathan Vs. State of Maharashtra (Criminal Revision Application No.11/2017, decided on 28th March 2007);
- (vii) Ramesh Singh @ Chauhan Vs. State of Maharashtra (Cri.Revision Application No185 of 2004, decided on 23rd March 2005).

7. Learned APP submitted that prima facie case is made out against the applicant. It is submitted that the applicant is involved in serious crime. The applicant was the main person dealing in narcotic drugs. The co-accused were acting on her instructions. The contraband was procured from the applicant. Thus, there is substantial evidence against applicant to proceed against her. It is submitted that to frame charge a prima facie case is made out. The issue with regards to admissibility of evidence has to be decided at the time of trial of the applicant and the applicant cannot be discharged by accepting the submissions advanced by advocate for applicant. It is submitted that the Trial Court has assigned valid reasons for rejecting the application.

8. On going through the papers it is clear that the applicant has been arrested during the course of investigation. The alleged incident of recovery of contraband at the instance of accused nos.1 and 2 had occurred on 4th January 2015. The police had received information that two persons whose description was revealed in the information, are likely to come at the alleged spot for the purpose of selling heroin. After complying the procedural safeguards the police conducted the raid and apprehended accused nos.1 and 2 who were

found in possession of the contraband. It is apparent that the information which was received by police, was only qua accused nos.1 and 2. During the course of investigation the police recorded the statement of arrested accused and during interrogation of the said accused, it was allegedly disclosed that heroin powder was provided to them by applicant to be sold to her customers. The statement of accused no.2 was recorded on 4th January 2015. The statement of the applicant was also recorded on 27th July 2015. On the basis of said statement, the applicant was arrested. The statement of arrested accused no.2 Sushila disclosed that the contraband was brought by the accused from the applicant and the same was to be sold to her customers. Surprisingly both the statements are included in the charge sheet which is served upon the accused.

9. Thus, it is apparent that the prosecution is relying on the statement of co-accused to implead the applicant as an accused. The applicant was not arrested on the spot but was arrested on 27th July 2015 during the course of investigation. There is no recovery of any contraband from or at the instance of applicant. Except the statement of co-accused, there is no admissible evidence against the applicant even to frame a charge against her. In the case of Laxmi Koli Babita (supra), this Court after placing reliance on the decision of Supreme Court in the case of *Suresh Budharmal Kalani @ Pappu Kalani Vs. State of Maharashtra (1998-SCC {Cri}-1625)* as well as another decision of Supreme Court in case of *Kashmira Singh Vs. State of Madhya Pradesh (AIR-1952-SC-159)* had observed that application for discharge ought to have been allowed by the Trial Court since there was no evidence against the accused except the

statement of co-accused, which was pressed into service on behalf of prosecution. There was no other material on record to implicate the accused. In the case of Suresh Kalani (supra), it was observed that at the stage of framing of the charge the Court is required to confine its attention to only those materials collected during investigation, which can be legally translated into evidence and not upon other evidence that the prosecution may adduce in the trial, which would commence only after the charges are framed and the accused denies the charges. In the case of Kashmira Singh (supra), the Supreme Court observed that the confession of co-accused cannot be called in aid to frame charges against the accused in the absence of any other evidence to do so. In the light of the aforesaid observations, in the case in hand also, it can be seen that except the statement of the co-accused, there is no other independent evidence.

10. In the case of **Ramesh Singh Chauhan Vs. State of Maharashtra** decided by this Court, it was observed that the statement of the co-accused is inadmissible in view of Section 25 r/w Section 26 of Indian Evidence Act. Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved as against a person accused of any offence. The statement of co-accused which has been pressed into service was made before a police officer. Section 26 of the Evidence Act will also come in the way of prosecution to rely upon the statement of co-accused as that evidence is inadmissible in law. It was further observed that no statement u/s 67 of NDPS Act has been recorded which can be used against the accused. The statement of co-accused which is the principal evidence, cannot be looked into and being inadmissible in law.

11. In another decision of this Court in the case of Salim Shaikh, the accused was prosecuted solely on the basis of alleged information received by police that he is the person who deals with narcotic drugs and sells the same through co-accused and the said accused was implicated by co-accused during investigation. The Court held that the said statement having been made by co-accused before the police in the course of investigation, shall not be admissible against the applicant therein during his trial. In the case of Guljar Shaikh, the Division Bench of this Court held that in the investigation carried out by police, the statement of co-accused is weak piece of evidence, when it is recorded under Section 67 of NDPS Act.

12. In the facts and circumstances of the case, it is clear that the applicant was involved in the crime on the basis of statement of the co-accused who has stated that the contraband was brought from the applicant and the same was being sold to her customers. Such statement is not admissible in law in the light of settled principles of law of evidence. The prosecution has not made out a prima facie case to frame the charge. The Court cannot frame charge in relation to inadmissible evidence. In the impugned order, however, the Trial Court has erroneously observed that the NDPS Act being a special statute, the investigating officer which recorded the statement of the co-accused, is not a police officer in strict sense and therefore, the bar contemplated u/s 25 of Indian Evidence Act does not attract and the statement of the co-accused becomes admissible in evidence. The observation of the Trial Court depicts complete non- application of mind and ignores the settled principles of law. The Court further observed that the officers have recorded the statements of the co-

accused u/s 67 of NDPS Act and the said accused have stated that the contraband was procured from accused no.3 i.e. present applicant. Thus, there is other substantial evidence available on record to independently proceed against the applicant. It is not clear as to which is the other substantial evidence referred to by the Trial Court. The only material which was pressed into service was the statement of co-accused, who were found in possession of the contraband, which was made to the police officer. It is a settled principle of law that the sufficiency of grounds for proceeding must be judged on the basis of material in the charge sheet which is capable of and is expected to be transformed into evidence during trial. The order of Trial Court is, therefore, contrary to the provisions of law and deserves to be set aside. In the circumstances, this application has to be allowed by setting aside the impugned order and directing that the applicant be discharged from the said prosecution.

13. Hence, I pass following order :

ORDER

- (i) Criminal Revision Application No.498 of 2016 is allowed;
- (ii) The impugned order dated 16th July 2016 passed by NDPS Special Judge, City Civil and Sessions Court, Greater Bombay in NDPS Case No.170 of 2015, is quashed and set aside and the applicant is discharged from the said case.

(PRAKASH D. NAIK, J.)